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**IN THE  
COURT OF APPEALS OF INDIANA**

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ADRIAN D. RIGGS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0605-PC-392
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable William E. Young, Judge  
Cause No. 49G20-0208-PC-215263

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**May 21, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Adrian D. Riggs (“Riggs”) appeals the dismissal of his petition for post-conviction relief. Riggs claims the post-conviction court’s dismissal was erroneous for two reasons, which we restate as follows: 1) whether the withdrawal of the public defender as counsel was improper absent a hearing to permit Riggs to obtain new counsel; and 2) whether summary dismissal of the post-conviction petition was improper as the post-conviction court did not first issue a show cause order pursuant to Ind. Trial Rule 41(E). We affirm.

### **Facts and Procedural History**

On October 29, 2002, following a jury trial, Riggs was found guilty of conspiracy to commit dealing in cocaine, dealing in cocaine, and possession of cocaine. On November 26, 2002, the trial court merged the possession of cocaine conviction into the conspiracy to commit dealing in cocaine conviction and sentenced Riggs to concurrent sentences of thirty-five years and thirty years, with five years suspended. Riggs appealed that decision and his conviction was affirmed by this Court. See Riggs v. State, No. 49A04-0306-CR-271 (Ind. Ct. App. Jan. 22, 2004).

On July 19, 2004, Riggs filed a pro se petition for post-conviction relief alleging that he could not be convicted on charges of conspiracy to commit dealing in cocaine and dealing in cocaine arising out of a single event. Riggs’s petition was forwarded to the State Public Defender’s Office and Deputy Public Defender James T. Acklin (“Acklin”) filed his appearance on August 10, 2004. The direct appeal record was released to Acklin on October 18, 2005. On December 29, 2005, Acklin filed a motion to withdraw his appearance pursuant to Ind. Post-Conviction Rule 1(9)(c).

The post-conviction court reviewed Riggs's petition and dismissed it on March 14, 2006. This appeal ensued. Additional facts will be provided as necessary.

### **I. Withdrawal of Public Defender**

A person who has been convicted of, or sentenced for, a crime may challenge the correctness of their convictions and sentence by filing a petition for post-conviction relief. Ind. Post-Conviction Rule 1(1); Evans v. State, 809 N.E.2d 338, 341 (Ind. Ct. App. 2004). The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence. P-C.R. 1(5); Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001).

Riggs first claims that the post-conviction court erred in allowing Acklin to withdraw his appearance pursuant to Rule 1(9)(c), which provides in pertinent part: “[if] counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel *shall* file with the court counsel’s withdrawal of appearance.” P-C.R. 1(9)(c) (emphasis added). In a previous decision by this court, we found the word “shall” contained within the rule to be a command rather than an option. See Lott v. State, 724 N.E.2d 1118, 1119 (Ind. Ct. App. 2000) (holding that counsel must withdraw his appearance after determining that petitioners’ claim of insufficient evidence upon which to sustain his conviction was without merit). Counsel, however, must certify to the court that he has consulted with the petitioner regarding the grounds alleged in the petition and any other possible grounds and that he has conducted an appropriate investigation of the matter, including a review of the record. P-C.R. 1(9)(c).

Riggs argues that Acklin's motion to withdraw was defective and should have been denied by the post-conviction court for a lack of any representation of any investigation undertaken to determine the merits of any claims Riggs may or may not possess. Such representations, however, are not required by the Post-Conviction Rules. Acklin "did exactly that which the rule provided that he must do." See Lott, 724 N.E.2d at 1119. In his motion to withdraw, Acklin cited to Rule 1(9)(c), informed the court that he consulted with Riggs regarding the grounds raised in his pro se petition, certified that he conducted an appropriate investigation including a review of all pertinent transcripts, and provided Riggs with an explanation of the reasons for his withdrawal. Quite simply, Acklin satisfied all the requirements established by the Post-Conviction Rules. While Riggs argues that he should have been granted a hearing to determine the actual substance of the representations contained in Acklin's motion, there is no such requirement in the Post-Conviction Rules.

Still, Riggs argues that he was not provided with a procedurally fair setting. Riggs analogizes to our supreme court's decision in Waters v. State, 574 N.E.2d 911, 912 (Ind. 1991), for the proposition that a counsel's lack of representation following the entry of his appearance will deprive a petitioner of a fair hearing.

Riggs's reliance on Waters is misplaced. In Waters, the post-conviction counsel filed an appearance, but did not provide the petitioner with any meaningful representation, even going so far as to allow the petitioner to file pro se affidavits that he should have known to be technically inadequate. Id. The post-conviction counsel in Waters "should have taken the necessary steps to present [the affidavits] to the trial court

in an acceptable form. Counsel, in essence, abandoned his client and did not present any evidence in support of his client's claim." Id.

That is not the case here. Acklin did not "abandon" his client while continuing to represent him. Rather, Acklin filed his motion to withdraw pursuant to the procedures mandated by the Post-Conviction Rules. The post-conviction court determined that Acklin had done all that was required of him under the Post-Conviction Rules. We agree.

## **II. Dismissal of Petition**

When reviewing the post-conviction court's disposal of a petition for post-conviction relief, we "must look to the underlying reason the post-conviction court disposed of the petition to determine whether the petition was denied or dismissed." Joseph v. State, 603 N.E.2d 873, 876 n.4 (Ind. Ct. App. 1992). "A post-conviction relief petition may be summarily denied when the pleadings conclusively show the petitioner is entitled to no relief." Joseph, 603 N.E.2d at 876 (citing P-C.R. 1(4)(f)). Dismissal is only appropriate "when the petitioner has failed to comply with the trial rules or when he has failed to take action for a period of 60 days." Id. (citing T.R. 41(E) (2007)). The two words are not to be used interchangeably. Id.

Riggs argues that the post-conviction court erred in dismissing his petition without issuing an order to show cause and conducting a hearing. We have recognized that the dismissal of a post-conviction petition requires the court to issue an order to show cause and provide the petitioner with an opportunity to show why dismissal should not occur. See Colvin v. State, 501 N.E.2d 1149, 1150 (Ind. Ct. App. 1986) (Shields, J., concurring).

However, Riggs is not entitled to such an order or hearing if we determine, like the court in Joseph, that the post-conviction court denied--not dismissed--Riggs's petition.

Here, the post-conviction court specifically stated that it reviewed the petition before finding that it should be dismissed summarily. Appellant's App. p. 13. These findings are contradictory. If Riggs's petition were summarily dismissed, as provided by Rule 41(E), there would have been no need to review the petition because such dismissals are based on a lack of action over a sixty-day period or failure to comply with the trial rules, not the merits of the case. The post-conviction court's very review of Riggs's petition indicates that the petition was denied, rather than dismissed. Therefore, we conclude that Riggs was not entitled to an order to show cause as Rule 41(E) was not applicable here.

The only remaining issue raised in Riggs's petition was whether his convictions for dealing and conspiracy to deal the same drug violated double jeopardy. This issue, however, was waived for failure to raise it on direct appeal. See Riggs v. State, No. 49A04-0306-CR-271 (Ind. Ct. App. Jan. 22, 2004). Riggs has not provided any justification for raising such a ground for relief outside the normal trial and appeal process. Therefore, the post-conviction court did not err in denying Riggs's petition without further proceedings as "[t]he post-conviction relief process is not a substitute for a direct appeal, but is a process for raising issues not known at the time of the original trial or for some reason not available to the defendant for direct appeal." Lowery v. State, 640 N.E.2d 1031, 1036 (Ind. 1994).

Riggs’s petition conclusively shows that he is not entitled to relief. Any error in the post-conviction court’s use of the term “dismissal” was harmless.

### **Conclusion**

The post-conviction court is affirmed.

NAJAM, J., and MAY, J., concur.